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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

MAGNET MEDIA, INC., et al,

Cross-complainants and Respondents,

v.

CONSUMERINFO.COM, INC., et al.,

Cross-defendants and Appellants.

G042059

(Super. Ct. No. 07CC03249)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Daniel J. Didier, Judge. Requests for judicial notice. Order affirmed. Requests denied.

Sonnenschein Nath & Rosenthal, Robert F. Scoular, John E. Walker and Matthew C. Wolf for Cross-defendants and Appellants.

Krieg, Keller, Sloan, Reilley & Roman, Kenneth E. Keller, Thomas H. Sloan, Jr., Michael D. Lisi and Garth A. Rosengren for Cross-complainants and Respondents.

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Cross-defendants ConsumerInfo.com, Inc. and Experian Group Ltd. appeal from an order denying their motion to strike the cross-complaint of cross-complainants Magnet Media, Inc., Search Market Direct, Inc., and Stephen S. May under Code of Civil Procedure section 425.16 (anti-SLAPP motion; all further statutory references are to this code). They contend the court erred when it concluded the cross-complaint did not arise out of protected activity. We disagree and affirm.

Both sides have requested we take judicial notice of a variety of documents. We deny the requests.

FACTS AND PROCEDURAL HISTORY

According to the cross-complaint, cross-defendants provide consumer credit services and products. (For convenience, we will generally refer to the parties collectively even when the cross-complaint specifies only one.) Cross-complainants are in the business of marketing such products and services via the Internet to online users. In 2002, 2003, and 2005 cross-complainants and cross-defendants entered into successive agreements for cross-complainants to market consumer credit products and services on the Internet. Cross-complainants would maintain on their website, freecreditreportservice.com, a link to a site owned by cross-defendants, and earn commissions when consumers visited cross-defendants' site by using the link.

The cross-complaint alleges that cross-defendants committed illegal acts designed to prevent cross-complainants from benefitting under the agreements and from competing with cross-defendants in marketing consumer credit services. Cross-defendants used information it acquired by virtue of the agreements to discover cross-complainants' marketing and advertising methods. For example, cross-complainants had agreements with various search engines for their website to "appear prominently" when a consumer typed in pertinent search terms. Cross-defendants allegedly "targeted [those]

search engines” and took actions to disrupt the relationships so they could acquire them for themselves, diverting consumers directly to their website, sidestepping cross-complainants’ website, and eliminating payment to cross-complainants under the agreements.

Cross-complainants also plead cross-defendants fraudulently induced them to execute the 2005 agreement. According to a conversation between the parties, the terms of the agreement were to be the same as those in the 2003 agreement, with a minor, non-substantive change. But when cross-defendants prepared the 2005 agreement, unbeknownst to cross-complainants, they made two additional substantive changes, “knowing [cross-complainants were] not likely to read that small print” One changed the method of termination of the agreement, providing for automatic renewal unless notice to terminate was given 30 days prior to the expiration date. Cross-complainants signed the 2005 agreement without reading it and did not know of the substantive changes. Subsequently when cross-complainants attempted to terminate the agreement it had already automatically renewed for another year.

Additionally cross-complainants plead cross-defendants improperly interfered with their attempt to use or acquire another URL, freecreditscore.com, which cross-complainants had purchased from Mark Timothy. Cross-complainants did not know that Steve Paige, the original registrant of the name, had filed a chapter 7 bankruptcy. At cross-defendants’ urging, the trustee filed an adversary proceeding against cross-complainants to recover the URL and reached an agreement with cross-defendants to buy an interest in the adversary proceeding for \$1.825 million, including the right to the URL if the trustee recovered it.

In the meantime, cross-complainants allegedly had negotiated an agreement with Paige, who had converted the bankruptcy to a chapter 11, to fund the estate so all creditors would be paid and the adversary proceeding would be dismissed. Cross-defendants contacted Paige directly, although he was represented by counsel, offering

him \$20,000 to retain a new lawyer, whom they suggested, and possible employment if he would withdraw the agreement with cross-complainants from the court's consideration; Paige did so. Cross-defendants then entered into a new agreement with the trustee to purchase an interest in the adversary proceeding, which the court approved.

Cross-complainants allege they then renegotiated with the trustee to settle the adversary proceeding by funding the estate sufficiently to pay off all creditors, including cross-defendants' \$1.825 million. To prevent the settlement, cross-defendants bought a third-party creditor's claim to the URL and, though it had no merit, amended it to increase the amount sought from approximately \$132,000 to \$2 million. The trustee conceded the claim was overstated but allowed it to remain until after the adversary proceeding was litigated, thereby blocking cross-complainants' proposed settlement and giving cross-defendants the opportunity to prevail on the claim and obtain the URL.

The cross-complaint contains seven causes of action: interference with contract, interference with prospective economic advantage, unfair trade practices, statutory and common law unfair competition, fraudulent inducement into contract, and breach of the covenant of good faith and fair dealing. These are more fully described in the discussion. In denying the anti-SLAPP motion, the court ruled cross-defendants had not shown the causes of action arose from exercise of their rights to petition.

DISCUSSION

Section 425.16, subdivision (b)(1) provides a party may bring a special motion to strike any "cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue" An "act in furtherance of a person's right of . . . free speech under the United States or California Constitution in connection with a public issue" includes: (1) any written or oral statement or writing

made before a . . . judicial proceeding” (§ 425.16, subd. (e).) To prevail on the motion, cross-defendants must show the cross-complaint arises from their exercise of free speech (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67), that is, the “act underlying . . . [cross-complainants’] cause of action must *itself* have been an act in furtherance of the right of . . . free speech.” (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78.)

A review of the cross-complaint shows that the wrongs alleged are cross-defendants’ interference with cross-complainants’ rights under the agreement and cross-complainants’ attempts to compete by acquiring and using the URL. The common law and statutory unfair competition causes of action and the cause of action for interference with prospective economic advantage allege cross-defendants misused information gleaned from the agreements to disrupt the relationships cross-complainants had developed with Internet search engines. This was intended to prevent cross-complainants from earning commissions under the agreements. Cross-defendants also allegedly tried to thwart cross-complainants’ acquisition of the URL to hamper their attempts to market the credit services and products, again to deny cross-complainants commissions.

Cross-defendants allegedly did this by convincing the trustee to file the adversary proceeding against cross-complainants to recover the URL and then purchasing an interest in the adversary proceeding. They also allegedly contacted the debtor directly, in violation of ethical rules, convincing him to disavow the agreement he had with cross-complainants whereby they would be able to retain the URL by paying off all the bankruptcy creditors and having the adversary proceeding dismissed. Finally, the cross-complaint pleads that cross-defendants purchased a third party creditor’s claim in the bankruptcy and amended it by improperly and substantially inflating the amount sought, again to prevent cross-complainants from funding the estate and keeping the URL.

In the cause of action for interference with contract cross-complainants plead cross-defendants acted to prevent their purchase of the URL by engaging in the acts

set out above. The cause of action for unfair trade practices alleges cross-defendants “attempted to intimidate [c]ross-complainants into relinquishing any claim or otherwise attempting to obtain the URL . . .,” also by engaging in the acts described above.

Cross-defendants’ purported wrongful acts were business activity. The alleged attempts to interfere with and disrupt cross-complainants’ relationships with search engines are not even remotely connected to protected activity. Cross-defendants’ negotiations and agreements with the debtor and the trustee to allegedly prevent cross-complainants from obtaining the URL were not the “‘principal thrust or gravamen’” (*Club Members For An Honest Election v. Sierra Club* (2008) 45 Cal.4th 309, 319) of cross-complainants’ claims. As alleged, cross-defendants were battling with cross-complainants over ownership and control of the URL. That it was partly fought within the confines of a bankruptcy action does not make cross-defendants’ actions protected activity. Rather, it is incidental. Cross-complainants do not seek redress for cross-defendants’ communicative acts but for its alleged acts interfering with cross-complainants’ business activities. (See *Scott v. Metabolife Internat., Inc.* (2004) 115 Cal.App.4th 404, 417.)

Causes of action containing claims of protected and unprotected activity, commonly referred to as “mixed,” do not merit anti-SLAPP protection where “‘the protected conduct is “merely incidental” to the unprotected conduct.’ [Citations.]” (*Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 672.) “[A] defendant in an ordinary private dispute cannot take advantage of the anti-SLAPP statute simply because the complaint contains some references to speech or petitioning activity by the defendant. [Citation.]” (*Martinez v. Metabolife Internat., Inc.* (2003) 113 Cal.App.4th 181, 188.) The court properly denied the motion as to these five causes of action.

The sixth cause of action alleges cross-defendants induced cross-complainants to enter into the 2005 agreement by materially misrepresenting changes in

the terms of prior agreements, including a change in cross-complainants' right to terminate the agreement on 30 days' notice. Plainly this is not protected conduct and the court correctly exercised its discretion here as well.

We also deny the several requests for judicial notice. In cross-defendants' first request for judicial notice, they submit two rulings on demurrers to the cross-complaint and the transcript of a hearing on one. The second request contains a copy of the cross-complaint with allegations relating to the bankruptcy highlighted, the memorandum of decision and judgment in the adversary proceeding in the bankruptcy, and an order denying a stay pending appeal in that action. Cross-complainants' request submits a copy of the operative complaint in this action, and copies of rules of professional conduct prohibiting a lawyer's direct contact with a party who is an adversary and represented by counsel from three different states. None of these documents are necessary to our decision.

DISPOSITION

The order is affirmed. The requests for judicial notice are denied. Cross-complainants are entitled to costs on appeal.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

O'LEARY, J.

ARONSON, J.